Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission	)	GC Docket No. 96-55

REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services, pursuant to Notice of Inquiry and Notice of Proposed Rulemaking, FCC 96-109, released March 25, 1996, in the above-captioned proceeding, hereby submits its Reply Comments.

ALTS is the non-profit national trade organization representing competitive providers of exchange access and exchange telecommunications services. ALTS membership includes over thirty providers of competitive services. As providers of competitive services the members of ALTS are affected by any rules that the Commission might adopt that would limit their ability to analyze and comment on the tariff filings of incumbent local exchange carriers for services upon which the competitive carriers rely and for which the competitive carriers have virtually no alternative. Although ALTS limits these reply comments to requests for confidentiality regarding tariff proceedings under Section 203 of the Communications Act, the general principles that apply in those proceedings may be relevant in other areas.

What concerns the members of ALTS is the underlying current of some of the comments that have been filed that suggest that the policy and factual basis underlying the long standing rules of the Commission relating to the availability of tariff support material has somehow magically disappeared with the passage of the Telecommunications Act of 1996.[1] Some of the incumbent local exchange carriers take the position that competition exists in all service areas and that the only reason that anyone could possibly want to examine cost support information would be to use that information to gain an unfair competitive advantage against the incumbent local exchange carrier.[2] As a corollary to this position, the ILECs seem to take the position that cost support

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996). In addition, the Joint Parties infer that the passage of new section 222(a) in the Telecommunications Act of 1996 somehow gives added impetus to the Commission to craft new rules in the area of disclosure of competitive information. However, new Section 222, which is entitled "Privacy of Customer Information" simply states the all carriers have a duty to protect the confidentiality of proprietary information obtained from other carriers. Clearly, this section is irrelevant to the Commission's consideration of the release of information obtained in performing its statutory duties.

[2] See, e.g., Comments of Cincinnati Bell Telephone at 3:

> [T]he better course is for the Commission to determine that the new competitive environment has effected a fundamental change in the nature of tariff proceedings such that the public interest concerns that underlie the history of open tariff proceedings are now outweighed by the submitter's need to protect competitively sensitive information.

See also Comments of SBC Communications, Inc. at 5-7; Comments of Ameritech, the Bell Atlantic Telephone Companies, Bell Communications Research, Inc., Bellsouth Corp., NYNEX Corp., Pacific Bell and Nevada Bell, and US West, Inc. (hereinafter Comments of Joint Parties) at 2("[T]he 1996 Act ensures that competition for local exchange services will develop quickly and on a sustainable basis.")

materials are necessarily "confidential" information under the Freedom of Information Act (FOIA).[3]

As ALTS has said many times at this Commission, "We wish that were the case." When, in fact, there is real competition in the exchange access and local exchange markets, it will be entirely appropriate for the Commission to alter its rules and, as suggested by Southwestern Bell, no longer require carriers to support their tariff filings with cost data.[4] When there is real competition in markets, it may even be appropriate for the Commission to forbear from requiring the filing of any tariffs. At this time, however, when competition in exchange access and local exchange service is just beginning to emerge, it would be extremely premature for the Commission to make any significant changes in its rules relating to the public disclosure of information supporting tariff filings.

The passage of the Telecommunications Act of 1996 has encouraged the development of facilities based competition for ILEC services, but has in no way instantly transformed the landscape. As the Joint Comments recognized "Congress has clearly directed that the Commission manage a transition to a fully competitive telecommunications industry."[5] The key question here is whether the Commission will "manage a transition to a fully competitive telecommunications industry" or whether it will prematurely declare that somehow we have already reached

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[3] Comments of Joint Parties at 8-9, 24.

[4] See Comments of SBC Communications at 6.

[5] Comments of Joint Parties at 2 (emphasis added).

that point and simply give up and go home.

I. THE INCUMBENT LOCAL EXCHANGE CARRIERS HAVE NOT MADE A SHOWING THAT CHANGES IN THE COMPETITIVE ENVIRONMENT HAVE BEEN SIGNIFICANT ENOUGH TO CHANGE THE COMMISSION'S LONG STANDING RULES RELATING TO THE PUBLIC AVAILABILITY OF TARIFF SUPPORT MATERIAL

The Freedom of Information Act[6] makes information in the possession of a federal agency available to members of the public upon request, unless such information is exempt from disclosure under a specific exemption. Pursuant to the FOIA, the Commission in 1967 adopted general rules to govern its operations. The Commission concluded that cost support material filed with tariffs would be routinely available for inspection. Thus, for many years the general practice has been to allow the public to review tariff support material. This has enabled commenters to make meaningful objections to proposed tariff rates, terms and conditions. Consequently the tariff review process has been more thorough and more efficient with resulting benefits to Commission resources and the public interest. On occasion in the recent past the Commission has granted confidential treatment in particular tariff proceedings.

In its NPRM the Commission did not propose any changes to the general availability of tariff support material. Rather it asked whether it should continue to make exceptions to the Commission's rule requiring such data to be made publicly

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[6] 5 U.S.C. § 552.

available. The Commission stated

> In this regard, we seek comment on how petitioners will be able to formulate meaningful objections to the proposed tariff rates, terms and conditions, often a critical part of the tariff review process, if they are unable to review all support material prior to the date that petitions are due.

The NPRM/NOI was thus relatively limited and addressed, with respect to tariff filings, whether the Commission should continue, on occasion, to grant confidential treatment of tariff support material. The Commission raised as a possibility the use of protective agreements that parties could use in order to allow review of material that is confidential.

Several commenters have gone way beyond the proposal in the NPRM/NOI. SBC Communications, for example states that the

> ILECs should no longer be required to support tariff filings with cost data. Competition will ensure that prices are reasonable. If they are not, customers can seek remedial action after a tariff becomes effective or simply seek another provider. Aggrieved parties can still avail themselves of the Commission's complaint process to seek a determination of the lawfulness of any tariff filing.[7]

ALTS respectfully suggests that this proposal is based entirely upon a mistaken view of the current marketplace and is wholly insufficient to control the ILECs' immense market power.[8] SBC next argues that if the Commission does not revise its rules to eliminate the submission of cost support information, then it

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[7] Comments of SBC Communications at 6-7.

[8] The complaint process is very cumbersome and does not protect against the injury that effective, but unlawful, tariffs can have on consumers and competitors.

should end the presumption that cost data should be made public unless the filing party can show that it will suffer competitive harm. SBC asks that the Commission amend its rules to provide that cost data will be presumed to be confidential.[9] The Joint Parties advocate a somewhat less strident approach. However, it would still result in a significant departure from the Commission's rules. It appears that what the Joint Parties advocate is a system whereby an entity filing tariff support material could, on their own accord, limit the disclosure of cost data to those who execute a protective agreement.

The issue raised by these proposals is whether there has been any change that would justify the Commission's reversal of its long standing rule. Nothing in the Communications Act of 1996 and nothing in the overall marketplace for telecommunications services warrants such a drastic change in the Commission's longstanding policy. Some of the commenters would like the Commission to believe that competitive provision of access and other services is significant. However, as the Commission itself recently noted competitive access provider revenues represent a de minimus portion of the market (between one and two percent).[10]

The incumbent local exchange carriers continue to provide the vast majority of exchange access and local exchange service

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[9] Comments of SBC Communications, Inc. at 7. See also Comments of the Joint Parties at 24.

[10] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, Notice of Proposed Rulemaking at n.13.

in this country. While carriers such as the members of ALTS are beginning to compete in these markets and many of them are installing their own facilities, the new carriers are dependent upon the incumbent's monopoly facilities, paticularly the local loop, for provision of the competitive services.[11] The ILEC comments seem to forget that companies such as the members of ALTS are captive customers of their services as much as they are competitors.[12] The incentives of incumbent local exchange carriers to price services and facilities needed by their competitors higher than they should be is significant. In addition, as the comments of Time Warner filed in this docket demonstrate, ILECs can use the issue of confidentiality to "prevent interested parties from analyzing and formulating objections to ILECs' proposed rates."[13]

II. CONTRARY TO THE ASSERTIONS OF SOME OF THE COMMENTERS USE OF PROTECTIVE AGREEMENTS CAN BE BURDENSOME AND CAN AFFECT AN ENTITY'S ABILITY TO COMMENT EFFECTIVELY IN A TARIFF PROCEEDING.

A number of the commenters advocate a significant increase in the use of Protective Agreements when cost support material is

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[11] There are many ILEC services and facilities used by competitive carriers for which there is no substitute. Congress recognized these realities in enacting sections 251 and 252 of the '96 Act.

[12] As the Commission itself has noted, "[p]ersons who pay tatiff rates have a compelling interest in obtaining access to data that are relevant to the rate computations." Annual 1989 Access Tariff Filings, 3 FCC Rcd 720, 7202 (CCB 1988).

[13] Comments of Time Warner Communications Holdings, Inc. at 6-7.

reviewed by interested parties. These commenters argue that there is no real burden on the parties signing the agreement and that protective agreements are an effective method of allowing parties to comment on tariff filings without any competitive harm for the filer.[14] ALTS recognizes that there could be instances in which tariff supporting information should either be withheld or only available pursuant to a protective order, but, because protective orders are inconvenient and burdensome, they ought to be used spareingly.

For example, for a smaller company or trade association, even the burden of filing two sets of comments may be significant. Many of the members of ALTS, for example, have only one or two employees covering all the Commission proceedings. Simply having to file a public and a confidential pleading can put a significant strain on these smaller entities.

The model protective order attached to the NOI/NPRM states that the confidential information shall be made available only to counsel to the reviewing party or if the reviewing party has no counsel, a person designated by the reviewing party. "Reviewing Party" is defined as a party to a Commission proceeding or any person or entity filing a pleading in a Commission proceeding.[15]

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[14] See, e.g., Comments of the Joint Parties at n.32.

[15] The Joint Parties suggest that only parties that have already intervened in a proceeding ought to be able to review material pursuant to a protective order. The Joint Parties state that if the FOIA request is not made in the context of an active proceeding before the Commission, the requesting party should be required to demonstrate a compelling need for access to the information before access is granted, even subject to the protective order.

However, they do not explain how this would work in the context of a tariff. Any person or entity that wishes to review tariff support material should be able to do so, even if under a protective order, in order to determine whether a petition to reject or suspent the tariff is reasonable.

Efficient and prompt access for all parties to such information is not ar invitation to a fishing expedition. Rather, with the introduction of competition and the added incentives created thereby for the ILECs to price services so as to disadvantage their competitors, there is no way to police such behavior solely through use of Commission resources. It is only with the help of consumers, and competitors, that the Commission will be able to continue to satisfy its statutory mandates relating to the lawfulness of tariffs.

The Joint Parties advocate that any protective order should prohibit the copying of the protected material. However, this could present tremendous problems for smaller companies and trade associations in reviewing materials. Again, the smaller companies and trade associations may have very few or no employees stationed in the Washington, D.C. area. To insist that they review the materials at one place without being able to make a copy and return to their offices could be a substantial burden.[16]

Finally, any protective order should not limit use of the

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[16] We also note that the proposed copying fee of up to 25 cents per page contained in the Commission's model agreement could result in an unjustified expense for small companies and a windfall for the larger carriers.

confidential information in other related Commission proceedings. There can be no injury to the submitting party if the material continues to be covered by the agreement. Use of information gleaned in one tariff proceeding can be very helpful in determining the reasonableness of different rates and conditions in another tariff.

CONCLUSION

The Commission must reject the far reaching proposals of some of the ILECs. In so doing the Commission should reiterate that tariff support material will be generally available for public inspection. While the Commission should recognize that on occasion competitively sensitive information may be filed and requests for confidential treatment may be appropriate, the Commission should make clear the such requests will be scrutinized carefully and granted only in extraordinary cases in which the public's right to know is outweighed by the competitive harm that could occur. The Commission should make it clear that parties seeking confidential treatment of tariff supporting material have the burden of showing that disclosure is likely to cause them harm and that requests for confidential treatment will not be granted routinely.

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July 15, 1996

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Comments of the Association for Local Telecommunications Services was served July 15, 1996, on the following persons by United States mail or by hand service as indicated.

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